1978

Industrial Construction Inc. et al v. State of Utah : Appellant's Reply Brief

Utah Supreme Court

John G. Marshall; Tuft & Marshall; Attorney for Respondent;
Robert B. Hansen; Leland D. Ford; Attorneys for Appellant;

IN THE SUPREME COURT OF THE STATE OF UTAH

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INDUSTRIAL CONSTRUCTION, INC., a Nevada Corporation, and PRITCHETT CONSTRUCTION COMPANY, a Joint Venture,

Plaintiffs and Respondents,

vs.

STATE OF UTAH, by and through the DEPARTMENT OF TRANSPORTATION,

Defendant and Appellant.

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IN THE SUPREME COURT OF THE STATE OF UTAH

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APPELLANT'S REPLY BRIEF

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ARGUMENT

INTRODUCTION

Respondent's brief raises some points not covered in Appellant's brief, as well as a Cross-Complaint.

One of the points raised by Respondent concerns matters allegedly raised for the first time on appeal and which were not raised in the pleadings or argued to the trial Court. This requires a response and some considerable amount of argument to explain, which Appellant has included in this Reply Brief.

Other points covered in this Reply Brief respond to points raised in Respondent's brief which are inaccurate or which are misleading unless explained in greater detail than is set forth in Appellant's brief.

By way of additional comment, Appellant wishes to respond to Respondent's assertion on Page 9 of its brief that "apparently there is no challenge to other Conclusion of Law, except number 2." This is factually not true, and Appellant wishes to be understood as being opposed to a number of the Conclusions of Law as well as various Findings of Fact since Appellant believes many of them to be improper or inaccurate. Appellant did not attempt to catalogue all its objections since many, although believed to be erroneous are not critical to Appellant's theory of this case.

POINT I

RESPONDENT'S ARGUMENT CONCERNING THE MEANING AND EFFECT OF CONCLUSION OF LAW NUMBER TWO IS ERRONEOUS.

Respondent's argument in Point I concerning the distinction between what Appellant asserts is a finding that Respondent was excused from having to comply with the "split stockpile" provision by the Court and what Respondent asserts is a finding that "Respondent was led to believe that what it did was in compliance with contract requirements" is a legal fiction. Respondent's argument merely proves Appellant's contention to the effect that Respondent intended to mislead Appellant into believing that it intended to comply with the split stockpile provision as set out in the contract while all along it intended to circumvent the requirement to construct separate sized piles of aggregate. (See Appellant's Argument on this point in Section I of its brief.)

If in fact Respondent at the time it submitted its alternate proposal did not intend to colocate the piles of separate sized aggregate at the hot mix plant, why didn't it say so in its proposal? Again, if this was its intent at that time, why didn't it advise the engineer that what it planned to do did not in fact "meet the intent" of the specification when it received the reply from the State's engineer?

(Exh. P-3). Appellant does not agree that Respondent or the trial judge were correct in Conclusion of Law No. 4 that "there was no requirement in the contract as to where the three stockpiles were to be located." A fair reading of the specification reveals that it is talking about how aggregate piles are to be stored and the composition of the piles. It also says "the minus 4 aggregate shall be fed at a uniform rate." (Exh. D-4, Sheets 56 and 57) It is an inescapable conclusion that if you feed the "minus 4 aggregate at a uniform rate" you have to mix in aggregate larger than number 4, or you will not meet specification requirements. Thus, the location of the piles at the hot plant site is specified at least by implication, since one pile alone would not suffice.

Whether the Court concluded that Respondent was "excused" from complying with the specification on aggregate storage, or merely "led to believe" that what it did was in compliance with the requirement is really immaterial. The net effect is the same and in either instance the Court was wrong.

Without the testimony of Appellant's engineer who was stricken a few days prior to trial by a stroke and in a coma during the first phase of trial (R. 677)[1] and deceased during the second phase, the Appellant was unable to ascertain why Respondent was permitted to start production of asphalt

without the storage of aggregate in separate sized piles at the plant site. The record shows that Respondent had continued to assure Appellant that the piles would be located at the hot plant as late as Sept. 16, 1975, which was two days before production began. (R. 655)[1] In fact, on this date Appellant's engineer Burgess told Wood he had to have "three" piles to be in specification. (R. 673) On September 23, 1975, Appellant's engineer Burgess by letter directed that "two or more piles be located at the plant." (Exh. P-5) If Appellant's engineer permitted Respondent to proceed without the requisite piles at the hot plant, it was not authorized by any contract modification in writing. If it was done by verbal permission of Appellant's engineer, then Respondent should have known that Appellant's engineer Burgess did not have the authority to change the specification as he had already stated in writing. (Exh. D-9) The record also shows that Appellant's chief materials engineer had specifically told Mr. Wood of Respondent that the use of one stockpile was not acceptable in a meeting on August 20, 1975. (R. 286-289) In view of the letter from Burgess dated September 23, 1975 (Exh. P-5) it appears that the engineer had not in fact authorized Respondent to proceed without the multiple piles at the hot plant site. The record shows that the Appellant's understanding was that the piles of different sized aggregate referred to in Respondent's proposal of May 28, 1975 would be located at the plant site. (R. 678)[1]

Respondent in Point I of its brief refers to Conclusions of Law numbered 6,7, and 8 which deal with the bituminous surface course gravel and which demonstrate substantial compliance with the acceptance criteria for that product. Respondent asserts that because it met the acceptance criteria for payment, its failure to follow the method specification (if that in fact was the case) is "harmless error." Appellant submits that this is false. They are two entirely different matters. Respondent is suggesting here that since he can meet the payment specification he should not be required to follow the "method specification." This ignores the fact that the "method specification" is an integral part of the contract. Appellant's witnesses Stephensen and Peterson testified concerning the importance of the "method" at great length. (R. 289-290 and R. 474-486)[1] The record further demonstrates the fallacy of the Court's Conclusions 6,7 and 8. Appellant submits that had the contractor followed the "method" it might have been in "full" compliance rather than "substantial." In any event, Respondent's ability to meet the payment specification doesn't justify failure to follow the "method" specification. It should be observed here that the trial Court avoids this pitfall by its Finding of Fact No. 8 to the effect that Mr. Wood of Respondent was informed by Mr. Anderson of Appellant that Sheet No. 56

(aggregate storage) of the special provisions (Exh. D-4) would not apply. Its further Conclusion of Law No. 2 based on this Finding of Fact regarding the Respondent "being led to believe an adjustment in the specification would be made," thus renders the testimony of several of Appellant's witnesses moot on the point of the necessity of following the method specification.

Appellant asserts that the evidence of its witnesses shows the absolute necessity of the method being followed. Again, Respondent's ability to stay within "substantial compliance" under the pay specification is not the issue, and the Court's findings in this area, while not specifically contested, are simply unnecessary. A comparison of these findings with Exhibit No. D-12 reveals their inaccuracy in any event.

In any event, let it be clearly understood that Appellant here objects to Conclusion of Law No. 2 if it in fact means anything different than that Respondent is excused from compliance with the "split stockpile" requirement. Appellant further takes issue with Conclusion of Law No. 4 to the effect that there was no requirement in the contract as to where the three stockpiles were to be located for the reason set forth above, i.e., that the implication is that the piles (at least two) would be colocated at the plant site to allow material to be fed at a "uniform rate." Respondent further

disagrees that "plaintiff (Respondent) was reasonably led to believe that it was in compliance with the requirements of said construction contract" as suggested by Conclusion No. 6. Appellant submits that the evidence is quite the contrary and shows, if anything, that Respondent was promising that it would comply while all along it had no intent of complying.

Appellant further disagrees that Appellant breached the contract and specifically disagrees with the assertion Respondent on page 11 of its brief that a "reversal of paragraph 2 of the findings would not require a reversal of paragraphs 7, 8 and 9." What Appellant has urged and argued in its brief is that if Respondent in fact has failed to comply with its alternate proposal contained in its letter of May 1975 (Exh. D-1), then it is guilty of the "first breach" and whether or not Appellant in fact breached the contract as concluded in paragraphs 7, 8 and 9 of the Conclusions of La is immaterial.

Appellant submits that if its letter of September 25, 1975 (Exh. P-6) is looked at in a "vacuum" it is easy to conclude that it may constitute a breach. On the other hand when it is placed in context with previous discussions and correspondence [Aug. 20, 1975 meeting (R. 286-289)[1], Sept. 1975 conversation (R. 655)[1] and Exh. P-5] it is apparent that it was an attempt to insure compliance by Respondent with

what it had previously agreed to do. Coupled with the fact that payment was ultimately made for the material referred to in said Exhibit,(R. 305, 316)[2] it is evident that the Court is in error in concluding that Appellant's letter of Sept. 25, 1975 was in fact a breach of contract. (Finding of Fact No. 21)

Therefore, if it is concluded that Conclusion of Law No. 2 is incorrect, then it means that Respondent was not "lead to believe that the contract would be modified or that what it in fact did was in compliance with the contract." This would leave Respondent subject to contract requirements, and Appellant submits that the evidence demonstrates that what Respondent did was not in compliance with its own written proposal since it was, at the least, interpreted differently by the parties with the responsibility for the ambiguity placed on the Respondent. This leaves Respondent in the position of committing the first breach even if Appellant can be considered to have breached the contract by its subsequent letter of September 25, 1975. (Exh. P-6)

POINT II

APPELLANT'S CONTENTIONS CONCERNING RESPONDENT'S "FIRST BREACH" AND "ELECTION OF REMEDIES" WERE RAISED BEFORE THE TRIAL COURT AND ARE NOT WAIVED UNDER UTAH RULES OF CIVIL PROCEDURE.

On page 13 of Respondent's brief it is asserted that the point concerning the "election of remedies" and "election to continue performance" of the contract by Respondent were not raised before the trial Court but raise for the first time on appeal. This assertion is not true, the record of the trial discloses that this point was rai on page 700 of the record of the first phase of the trial. At the commencement of trial Appellant sought leave to am its answer to raise the defense of performance by Pritche Construction as a waiver of the breach. The exchange bet Court and counsel cited above raises this defense as to I dustrial. Initially, it was Appellant's belief that perf mance by Industrial subsequent to Sept. 26, 1975 did not w any of its rights. Appellant subsequently determined that this performance by Industrial was after receipt of Appell letter clearly advising Respondent that any performance w be "pursuant to the contract." (Exh. P-10) Appellant add tionally believes and therefore submits that any performa for whatever reason is either a waiver of the right to cla a breach or an election of remedy to proceed with perform

The Respondent also asserts on page 12 of its bri that the point concerning "first breach" of the contract b Respondent was not raised before the trial Court. This is also not accurate. The trial of this matter was bifurcate The first part was to determine whether the Appellant had

breached the contract. This portion was tried on March 25, 26, 27, and on April 1, 1976. At the conclusion of this phase of the trial each of the parties submitted extensive Memorandums of Points and Authorities. These were submitted on April 1, 1976. In its Memorandum the Appellant raised the issue of first breach of the contract on pages 5 and 22.* The point concerning waiver of the breach by Respondent is argued on pages 15 and 16 of said memorandum under Section IV.

Appellant's Motion to Add the Defense Concerning Election and Waiver as to Performance by Pritchett Construction Co. was submitted March 19, 1976. The Memorandum of Points and Authorities is dated April 1, 1976. There were 4 days of trial in the interim with the major focus concentrated on the issue of breach of contract. By the time the Memorandums were submitted on April 1, 1976, the issues were much more sharply defined than in prior pleadings to the Court.

There was no formal request to amend the pleadings to conform to the evidence and particularly as regards the legal issues we are concerned with here. It is clear, however, that there was no objection by Respondent to these issues being raised and argued either by a written objection subsequent to April 1, 1976 or a statement for the record when the trial resumed on June 30, 1976. During the interim, and specifically on the 20th day of April, 1976, counsel for the parties met with

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* Pages Q 80 and Q 97 in the Record of Pleadings.

the trial Judge in Fillmore when the Court ruled that Appellant breached the contract. The Court during that proceeding made the following statement in announcing its ruling:

> . . . And the Court further finding that any additional work done by the Plaintiff and/or his Joint Venturer, to-wit: Pritchett Construction Company, was performed for the safety of the public and as an essential, necessary and mitigating work for the safety of the general public, and did not, in fact or in lieu, waive the breach of the contract, or any rights plaintiff had thereunder, or any duty or obligations that the plaintiff had. . . . (Emphasis supplied.) (R.P.3 of April 20, 1976 Proceedings at Millard County Courthouse, Fillmore.)

Note in the emphasized language the Court is referring to work done by Industrial Construction Co.

In the case of General Insurance Co. of America v. Carnicero Dynasty Corp., 545 P.2d 502, this Court said the following:

> . . . There must, of course, be either expres or implied consent of the parties for the trial of issues not raised in the pleadings. Implied conse may be found where one party raises an issue mater to the other party's case, or where evidence is in duced without objection. (Citation)
>
> Significantly, the first part of Rule 15(b) i not permissive in terms, for it provides that issu tried by express or implied consent shall be treat as if raised in the pleadings. (Citation to 3 Moor Federal Practice, 2d Ed. p. 991) Even failure to amend does not affect the results of the trial of these issues. . . .

More recently this Court in the case of L.A. Young Sons Construction Company v. County of Tooele, et al., decided Febr

14, 1978, cited the holding in the General Insurance Co. case and sustained that case. Factually, in the Young case, there was an objection raised to the attempt to raise different issues during the trial. In the instant case there was no objection to the issues concerning waiver of the breach by performance subsequent to that event by Respondent's election of remedies, and the point concerning first breach was likewise not objected to. The precedent of the General Insurance Co. case should therefore be controlling in this matter, and Appellant should not be foreclosed from raising this matter on appeal.

POINT III

THE COURT'S AWARD OF ANTICIPATED PROFITS IS IN ERROR AND RESPONDENT'S ARGUMENT IN SUPPORT THEREOF IS INCORRECT.

Respondent in Point IV of its brief alleges that the trial Court did not err in its award of anticipated profits. Appellant does not disagree with the legal authorities cited by Respondent but does take issue with the conclusions Respondent arrives at to the effect that they sustain the damages awarded by the trial Court for anticipated profits.

The main area of disagreement is with the assertion on page 33 of Respondent's brief that four deductions totaling $166,876.38 which Appellant contends reduce available monies

remaining in the contract at the time of the Court determi breach should not be deducted but should in fact be added the computation set forth in Appellant's brief. This woul demonstrate that sufficient monies are in fact available t allow an award of anticipated profit as great as that awar by the trial Court. A closer look at this will demonstrat that not only is Appellant correct but that the possibilit of any money for anticipated profit is even more tenuous t asserted by Appellant in its calculations set forth in Poi III of its brief on appeal.

The four items which total the sum of $166,876.3 are as follows:

Offset for finishing subgrade embankment	$11,05
Stipulated offset for finishing top soil, clean up, etc.	26,30
Adjustment for overpayment of roadway excavation	61,50
Adjustment for top soil quantity included in roadway excavation	68,01

The first item is the amount Respondent conceded it would c to finish the subgrade embankment. Payment for this work i included item in the contract pay item of roadway excavati Appellant's evidence on this point was that it would cost a much as $132,625.62 (R. 453)[2] to do this work, but the trial accepted Respondent's self-serving "opinion estimate" (whic incidentally was virtually unsupported by any calculations was strictly the opinion of Mr. Wood) instead of considerin

pellant's mass of evidence based on actual experience with this contractor on a job contemporaneous with and which was similar in scope, terrain, men and equipment to the subject project. (R. 174-223[2] and Exh. D-61 and D-62) To the extent that Respondent is incorrect in his estimate, the $90,301.35 which Appellant's calculation asserts is maximum available revenue for profit would be reduced accordingly. In any event, the figure of $11,055.00 represents the minimum actual cost to do the work and would not increase available revenues which would generate a profit.

The stipulated offset for finishing topsoil, clean up, etc. in the amount of $26,301.48 is again an offset for work unfinished on the date of the Court determined breach and represents the cost of doing work which is included in payment already received by Respondent.

As to these two items it could be argued that in the ordinary course Respondent would have recovered these amounts and should not be penalized. The answer to that is that the evidence at trial in effect demonstrates that Respondent has already recovered his anticipated profit in that he has recovered the full contract unit price without fully completing the work. Therefore, if Respondent is allowed to recover anticipated profit in addition to these amounts it results in a double recovery. For that reason the reduction is proper.

The last two items of "roadway excavation" and adjustment for topsoil are both the result of adjustments to previously estimated payments of the roadway excavation pay item based on actual measurements. As to the topsoil, payment is made under the pay item for "topsoil, state furnished" at $1.00 per cubic yard as opposed to $0.92 for the pay item of "roadway excavation." The record shows that separate measurements of topsoil amounts were kept and computed into yardage. (R. 310)[2] In paragraph 28 of the Findings of Fact the Court has properly allowed this reduction. In paragraph 26 of the Findings of Fact the Court has provided for ment of the topsoil. As to the roadway excavation deduction measurements of the partially completed work revealed an ove payment in the dollar amount of $68,018.82. (Exh. D-67) In dition, the testimony of James Cox which was unrefuted in the record revealed that the remaining amount of roadway excava was estimated to be 303,000 cubic yards (R. 247) instead of 432,967, which would be the mathematical difference between the amount paid for and the total planned quantity. (Exh. D- Any underrun in quantity either from actual measurement or based upon the estimate of remaining work means a correspond ing reduction in available dollars remaining in the contract Respondent's counsel in his agreement under Point IV of Respondent's brief is assuming that a deduction for an overpay to the contractor means the money is available to the contra

As can be seen, this is not true. If the planned quantity of a pay item underruns for whatever reason, the estimated contract amount is reduced accordingly. In the case of roadway excavation remaining to be done at the time of the Court determined breach, the question is moot anyway. The testimony of Respondent's witness Hitchcock established that there is no profit in the remaining roadway excavation because the cost of performing the work equals the return. (R. 109)[2] Appellant submits that contrary to Respondent's assertion, the deductions are proper in Appellant's calculations.

On page 34 of Respondent's brief it is argued that the Appellant's witness Rowley justified an award of 30% profit. This is an outright distortion of the testimony of the witness Rowley. The evidence shows that 30% is added on to the total labor amount, but not to equipment charges. (Exh. D-2, Sec. 109.04) This is quite different from the assertion of a 30% profit as claimed by the witness Hitchcock. In fact the witness Rowley testified that the 30% added on to the labor amount was for ". . . fixed costs, plus profit, fixed costs (sic), supervision and profit." (R. 210)[2]

It is clear that Respondent has not successfully refuted Appellant's claim that the money remaining in the contract at the time of the Court determined breach would not justify an award of anticipated profit in excess of $90,301.35,

and then only if one assumes that Respondent's optimistic cost projections are correct.

POINT IV

RESPONSE TO RESPONDENT'S ARGUMENTS CONCERNING GENERAL DAMAGES.

Appellant submits that the arguments advanced by Respondent do not alter the fact that there is no substanti evidence before the Court relating to "general damages." T facts asserted by Respondent on page 36 are at the best onl half true. For instance, fact number 1 there set forth all that "Plaintiff had the contracting capacity to bid and bon this contract, amounting to almost $7,000,000. . . ." The truth is Respondent had to enter into a joint-venture agree with Pritchett Construction Co. in order to bid the project. (R. 419-420)[1]

Respondent has also inserted a "bootstrap argumen on page 37 of its brief as follows:

> It is most probable, in view of the amounts involved, that the trial Court would have awarded damages in a greater amount, but limited the recovery to $100,000 because that was all that was prayed for in plaintiff's complaint.

The "amounts involved" are really immaterial unless they rea ably relate to a "damage" that is supported by "substantial dence."

Appellant by way of argument to counter Respondent's argument as set forth would simply observe that he has never known an attorney to draft a complaint seeking general damages which did not pray for more than he believed the damages to be.

The trial Court was in error to award the full claimed amount without substantial evidence in the record.

POINT V

APPELLANT'S RESPONSE TO ARGUMENTS BY RESPONDENT THAT EVIDENCE SUPPORTS THE COURT'S ALLOWANCE OF VARIOUS OTHER DAMAGE ITEMS.

A. COSTS OF WATER

On pages 38 and 39 of its brief Respondent argues that payment for water is not included in the pay item for "mobilization" and that Respondent's allocation of water costs to other contract items that required water is proper. In support of this argument Respondent cites Section 207 (Exh. D-2, pp. 82-83) of the Standard Specifications which is entitled "watering" and argues that this "shows that payment for water is not normally included under the heading of 'mobilization.' " (Emphasis supplied.)

In the subject contract there was no separate pay item for "watering." Unless Appellant is grossly mistaken it seems that this makes Section 601.01 directly applicable. Re-

spondent's arguments are therefore moot, and regardless of the testimony in support of Respondent's claim it cannot alter the contract provision. To rule otherwise invites the possibility of a double recovery for this amount.

B. BITUMINOUS PAVING DONE AFTER BREACH AND OFFSET CLAIMED BY APPELLANT BUT NOT ALLOWED BY THE COURT.

These two items and the arguments advanced by Respondent illustrate the hypocrisy and inconsistency of the Court's ruling regarding damages better than anything else in the judgment.

The Court, even though it found the contract to have been breached on September 25, 1975 by Appellant, nevertheless allowed Respondent to recover for paving work done October of 1975 under a "force account" or cost-plus formula which is a contract method used when an agreement for extra work cannot otherwise be arrived at. This was permitted by the Court even though the Appellant had notified Respondent in writing (Exh. P-10) that work performed would be considered part of the contract.

Contrast the foregoing with the approach taken by the Court in rejecting Appellant's evidence regarding the cost of finishing portions of the subgrade which were uncompleted as of September 25, 1975. Appellant's evidence was based on a force account approach using actual figures constructed from labor and equipment reports on a job similar in scope, terra

equipment, manpower and supervision contemporaneous with the subject project involving Respondent contractor. This "force account" approach revealed that the actual cost to Respondent of this "finish" work was $0.27 per square yard. Appellant's evidence defined in detail the yardage requiring finishing and was illustrated by over thirty photographs. The Court, however, rejected this approach. The dollar amount involved totaled $132,625.62. (R. 453)[2]

Respondent in its brief quotes Mr. Rowley as having testified that this was what it would "cost the State if the work was done on force account." (R. 193)[2] Appellant's response is that it only wants the Court to be consistent. If it is going to use a force account approach against Appellant, then it should also apply that formula against Respondent in a similar situation. In other words, to use an old adage, "what's good for the goose is good for the gander."

For the Court's information, the amount the Court allowed Respondent to recover for paving work done in October 1975 is $49,554.18. This is in addition to the contract price already paid based on the unit price. The amount Appellant seeks to offset for the cost of finishing subgrade is $132,625.62. The Court allowed $11,055.00. The offset is to reduce the amount already paid for roadway excavation totaling over one million dollars to allow for finishing work which is an included element in the unit price for roadway excavation.

If the Court's ruling is allowed to stand as to these two items, it can be readily seen that Respondent g the "best of both worlds." Some relief is obviously due pellant.

POINT VI

THE COURT DID NOT ERR IN FAILING TO AWARD ADDITIONAL MONEY TO RESPONDENT FOR EXPENSE OF RENTED EQUIPMENT.

In Point VII of its brief, the Respondent asserts that the Court was in error in that it failed to award the Respondent damages totaling $446,531.42 for equipment rent from others. The Court awarded the sum of $191,370.00.

Appellant in Point V of its brief has argued that the Court is in error in its ruling and that the amount aw is excessive. While conceding that in a bona fide breach contract it is proper to award damages for equipment rental the Appellant nevertheless asserts that those damages term if the rental agreements can be cancelled without penalty can be converted to a purchase contract and when it appears that substantial equity benefits have accrued.

Appellant asserts that the rights of the parties the instant case were fixed as of October 22, 1975 when the Respondent stated it considered the contract terminated. spondent in its brief argued that if Appellant had "recogn

its own breach of contract" that the "contention of Appellant would have merit." Obviously, the parties on September 25, 1975, October 22, 1975 and at the present time do not agree that a breach of the contract did or did not occur. Appellant still does not believe that it occurred, and Respondent obviously asserts that it did. The point is that the Respondent elected to stand on the alleged breach as of October 22, 1975, and that date should fix the liability of the parties and govern the consequences. It can readily be seen that if the agreements could have been terminated without penalty as of that date, that the Court's award is at least three times what would have been appropriate. To say that because Appellant refuses to admit it breached the contract justifies Respondent in retaining the equipment and incurring additional rental is ridiculous. Having elected to stand on the breach, Respondent incurs a duty to mitigate its damages.

The Court's award of $191,370.00 should be reduced if anything, but certainly should not be increased as urged by Respondent.

CONCLUSION

Appellant having responded to the points raised in Respondent's brief, including some new matters, submits that the relief requested in Appellant's brief is appropriate and

requests that the Court consider the relief requested on appeal as set forth in said brief.

Respectfully submitted this 19th day of May, 19

LELAND D. FORD
Assistant Attorney General
Attorney for Appellant

CERTIFICATE OF MAILING

This is to certify that two copies of the foregoing Appellant's Reply Brief were mailed, postage prepaid, to John G. Marshall of Tuft and Marshall, Attorneys for Respondent, 603 East 4500 South, Suite B, Salt Lake City, Utah 84107, this 19th day of May, 1978.